TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~189.~~ 24

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

JESSE THOMAS, WASHINGTON B. COOPER, AND SAMUEL WATKINS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED DECEMBER 13, 1870.

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1 The President of the United States of America to the judges of the circuit court of the United States for the middle district of Tennessee, greeting:

Because, in the record & proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between The United States of America upon the one part, & Jesse Thomas, Washington B. Cooper, & Samuel Watkins upon the other part, a manifest error hath happened to the great damage of the said United States, as by their complaint appears, & it being fit that the error, if any there hath been, should be duly corrected & full & speedy justice done to the parties aforesaid in that behalf: You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly & openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December, A. D. 1870, in the said Supreme Court, to be then & there held, that the record & proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right & according to the law & custom of the United States should be done.

2 Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this third Monday of October, A. D. 1870, & in the ninety-fifth year of the independence of the United States.

[SEAL.]

E. R. CAMPBELL,
Clerk of the Circuit Court of the United States
For the Middle District of Tennessee.

(Indorsed:) The United States v'. Jesse Thomas, former surveyor of customs, & sureties. Writ of error, issued on Nov'r 11, 1870. E. R. Campbell, clerk.

3 UNITED STATES OF AMERICA:

To Jesse Thomas, Washington B. Cooper, & Samuel Watkins, greeting:

You are hereby cited & admonished to be & appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the middle district of Tennessee, wherein The United States of America are plaintiffs, & you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected & speedy justice done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 12th day of November, A. D. 1870, & in the 95th year of the independence of the United States.

CONNALLY F. TRIGG,
Judge presiding.

(Indorsed:) The United States v. Jesse Thomas, Washington B. Cooper, & Samuel Watkins. Citation.

Affiant makes oath that he executed this citation on A. L. Demoss,

attorney of record of defendants in error, by delivering to him a copy of said citation on November 12th, 1870.

R. McP. SMITH,
U. S. Att'y.

Sworn to & subscribed before me November 12th, 1870.

E. R. CAMPBELL,
Clerk U. S. Circuit Court.

5 *Assignment of errors.*

THE UNITED STATES
v.
JESSE THOMAS, FORMER SURVEYOR OF CUSTOMS, & Wash. B. Cooper, & Sam. Watkins, sureties.

The error complained of is the charge of the circuit court that the surrender of the effects of the United States, if coerced by public enemies of the United States exonerated the officer from compliance with the obligation of his official bond to keep safely the said effects, & to pay them over as required by the proper officer.

For this error it is prayed that the judgment in said cause above-entitled be reversed.

R. McP. SMITH,
U. S. Dist. Attorney.

6 (Indorsed:) The United States v. Jesse Thomas, former surveyor of customs, & sureties. Assignment of error.

7 MIDDLE DISTRICT OF TENNESSEE, *ss:*

At a circuit court of the United States begun and held at the capitol of said State, in Nashville, within and for the district aforesaid, on the third Monday, being the seventeenth day of October, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the 94th year—

Present, the Hon. Connally F. Trigg, United States district judge for the several districts of Tennessee; present also, Thomas J. Harrison, esq., marshal, and Edward R. Campbell, esq., clerk of said court—

The following proceedings were had, to wit:

On the 23d day of August, 1869, a summons was issued, which is as follows:

Summons.

THE UNITED STATES
v.
JESSEE THOMAS, WASHINGTON B. COOPER, & Sam'l Watkins. 1485.

The President of the United States of America to the marshal of the middle district of Tennessee, greeting:

8 You are hereby commanded to summon Jessee Thomas, Washington B. Cooper, and Samuel Watkins, all citizens of the State of Tennessee, if to be found in your district, to be and appear before the judges of the circuit court of the United States in the sixth cir-

cuit for the district of Middle Tennessee, at the Federal court-room at Nashville in said State, on the third Monday in October next, then and there to answer the United States of America of a plea of covenant broken, to the plaintiff's damage twenty thousand dollars.

Herein fail not, and have then there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this the third Monday in April, in the year of our Lord eighteen hundred and sixty-nine, and of the independence of the United States the 93d year.

[SEAL OF THE COURT.] E. R. CAMPBELL, *Clerk.*

Issuance.

This summons was issued on the 23d day of August, 1869.

E. R. CAMPBELL, *Clerk.*

Return.

Came to hand same day issued, executed on Samuel Watkins,
9 W. B. Cooper, and Jessee Thomas, and delivered to each a copy of the declaration, August 28, 1869.

E. R. GLASCOCK, *Marshal.*
By N. M. SMITH, *D. M.*

On the 23 day of August, 1869, a declaration was filed, which is as follows:

Declaration.

Circuit court of the United States for the middle district of Tennessee.
October term, 1869.

The United States of America, by attorney, complain of Jessee Thomas, Washington B. Cooper, and Samuel Watkins, who are in court by summons of a plea of covenant broken.

For that, on March 19, 1859, at Nashville in said district, defendants executed their certain writing obligatory, which is here shown to the court whereby they bound themselves unto plaintiff in the sum of $20,000; the condition of said obligation being, that if said Thomas, who had recently been duly appointed, confirmed, and commissioned as surveyor of the customs for the port of Nashville, in the State of Tennessee, and who had been designated by the Secretary of the Treasury as a depositary to receive payments of money due to the United States,
10 had truly and faithfully executed and discharged, and should truly and faithfully continue to execute and discharge, all the duties of the said office, according to the laws of the United States, and had well, truly, and faithfully kept, and should well, truly, and faithfully keep safely, without loaning, useing, depositing in banks or exchanging for other funds than as allowed by the act of Congress thereinafter referred to and described, all the public money collected by him or otherwise at any time placed in his possession and custody till the same had been or should be ordered by the proper department or officer of the Government to be transferred or paid out, and when such orders for transfer or payment had been or should be received had faithfully and promptly made and should faithfully and promptly make the same as directed, and had done and should do and perform all other duties as fiscal agent of the Government, which had been or might be imposed by any act of Congress or by any

regulation of the Treasury Department made in conformity to
11 law, and also had done and performed, and should do and perform, all the acts and duties required law or by direction of any of the Executive Departments of the Government as agent for paying pensions or for making any other disbursements, which either of the heads of those Departments might be required by law to make, and which were of a character to be made by a depositary constituted by an act of Congress entitled "An act to provide for the better organization of the Treasury, and for the collection, safe keeping, transfer, and disbursement of the public revenue," approved August 6, 1846, consistently with the other official duties imposed upon him, then said obligation to be void and of none effect; but otherwise to abide and remain in full force and virtue.

Said bond was, as aforesaid, duly executed by said three defendants and was sealed with their seals on the day and year aforesaid, and was duly witnessed; after which said Cooper & Watkins, sureties of said Thomas, were duly sworn by the district judge of the United States at Nashville and their competency duly certified to by him, and also
12 their responsibility and sufficiency; after which the solicitor of the Treasury duly certified to the reasonableness and safeness of the sum named in the bond and of the sureties thereto, and that the latter were to him satisfactory, and so the bond was accepted; and thereunder said Thomas proceeded to discharge the duties of his said office as such surveyor and depositary.

But the condition of said bond was violated by said Thomas in this, viz: Certain public moneys were collected by him in said official capacity and were placed in his possession and custody in said capacity; and, on April 27, 1861, there was a balance of such moneys remaining in his hands belonging to the United States of $4,880.88, which sum said Thomas did not well, truly, and faithfully keep safely, as he was bound to do, but, on the contrary, he paid out the same to persons not entitled to receive the same, and so the same was wholly lost.

And he violated the condition of said bond in this, viz: Said sum so coming into his possession and custody and remaining in his hands, was ordered by the proper Department and by the proper officer
13 of the Government to be transferred and paid out, and said order was duly received by said Thomas, who, nevertheless, wholly failed and refused so to transfer or pay out any of said sums as so required; this to plaintiff's damage twenty thousand dollars; hence suit.

R. McP. SMITH,
U. S. Dist. Attorney.

On the 25th day of October, 1869, the defendants filed the following pleas, viz:

Pleas.

Circuit court of the United States for the middle district of Tennessee, October term, 1869.

THE UNITED STATES
v.
JESSEE THOMAS, WASHINGTON B. COOPER, AND Samuel Watkins.

The said defendants, by their attorneys, come and defend the wrong and injury, when, &c., and say that the plaintiff ought not to have and

maintain its aforesaid action thereof against them, because they say that the defendant Jessee Thomas did well and truly keep and perform all of his covenants in said writing obligatory specified, and did, as collector of the port of Nashville, Tennessee, and as depositary to re-
14 ceive payments of money due to the United States, faithfully and truly perform and discharge all the duties incumbent upon him as such officer, according to the laws of the United States, and did well and safely keep, in the manner covenanted in said writing obligatory, all the public money collected by him or otherwise at any time placed in his possession or custody until the said was ordered by the proper Department or officer of the Government to be transferred or paid out, and he did promp'ly make all transfers & payments so ordered; and he did, as fiscal agent of the Government, when so required, perform all duties imposed by any act of Congress, or by any regulation of the Treasury Department made in conformity to law, and all acts & duties required by law, or by direction of any of the Executive Departments of the Government, as agent for paying pensions or making disbursements, or in any other character whatever; and he did in all other respects well, truly, and faithfully, keep & perform each and all of his covenants in said writing obligatory set forth. And all of this they are ready to verify; wherefore they pray judgment, &c., &c.

15 2. And for a further plea in this behalf the said defendants, by their attorneys, come and defend and say actio non, &c., because they say that the said Jessee Thomas, as the collector of the port of Nashville, Tennessee, and as depositary of the public funds, and as fiscal agent of the Government to make disbursements and transfers of the public money, did well, truly, and faithfully perform all and every of his covenants in said writing obligatory set forth, and did well, truly, faithfully, and safely keep all public money that came into his possession or under his control in the manner covenanted in said writing obligatory, and did from time to time, whenever ordered by the proper persons or Departments, promp'ly make all disbursements and transfers required, and did perform all the duties imposed upon him by law, or by any act of Congress or by any regulation of the Treasury Department or by the head of any of the Executive Departments of the Government up to the day of , 186 , at which time, and while he was diligently engaged in faithfully performing his duties aforesaid, great political troubles arose in the State of Tennessee and all the South-
16 ern States, and the great bulk of the people of Tennessee engaged in a revolution against the Government, and levied troops, and prepared munitions of war for the purpose of resisting by arms the authority of the Government. At this time, to wit, on, &c., aforesaid, the government of the State of Tennessee was in the hands of persons hostile to the U. S. Government, and who were waging or actively preparing to wage war against the Government.

Defendants aver that this hostile State government had already made a league offensive and defensive with the so-called Confederate States, and that Isham G. Harris was then acting as Governor of the State, and was the chief executive officer of the said hostile State government, and as such chief executive officer had raised and kept armed and equipped in the city of Nashville a military force amply sufficient to enforce his authority.

Defendants aver that one S. R. Cockrill was the agent of said hostile government to seize and hold all property of the United States, or of citizens loyal to the United States for the use of the said hostile State government or of the said Confederate States.

17 Defendants aver that while the said Jessee Thomas was engaged as aforesaid in discharging his duties aforesaid, on, &c., aforesaid, the said Isham G. Harris and the said S. R. Cockrill demanded of the said Jessee Thomas that he should turn over to them or one of them, for the uses aforesaid, all of the public money & securities then in his hands, and the said Jessee Thomas resisted the unlawful demand to the utmost of his power, and refused to deliver up the said money and securities, but the said Cockrill and the said Harris who, as aforesaid, then had in Nashville a military force sufficient to enforce all of their orders in this behalf, threatened to have the said Jessee Thomas seized and imprisoned, and to inflict upon him whatever other bodily harm and punishment might be necessary to force him to comply with their demand. And the said defendants say that the said Cockrill and Harris would have executed their threats upon the said Thomas and would him greatly endangered, if they had not taken his life, if he had longer refused to obey their orders. And they further say that at the time aforesaid nearly all the people of Middle Tennessee were in full sympathy with the said
18 Harris & Cockrill, and that the United States were then powerless to assist the said Jessee Thomas, and so they say, that in fact after the said Thomas had resisted, at great personal hazzard, as long as he could, he yielded to irresistible force, and under the duress aforesaid unwillingly turned over to the said Harris & Cockrill the said money, &c., in the declaration mentioned. And they aver that in this way and in no other way, for the purpose of saving his life or preventing great bodily harm to himself, and when resistance would have been utterly futile and vain, he paid the said money, &c., as aforesaid. All of which they are ready to verify; wherefore they pray judgment, &c.

DEMOSS & MALONE,
Att'ys for Defendant.

On the 25th day of October, 1869, a replication was filed to defendants' pleas which is as follows:

Replication.

And the plaintiff, for replication to the several pleas of the defendants, says that no one of the same is true in manner and form as pleaded. And this it prays may be enquired of by the country.

19 R. McP. SMITH,
U. S. Dist. Att'y.

And the defendants do the like.

DEMOSS & MALONE,
Attorneys for Defendants.

At the April term, 1870, this cause was continued on the affidavit of the defendants.

On the 11th day of May, 1870, the following pleas were filed by the defendants by leave of the court.

Amended pleas.

After leave of the court first had and obtained, the defendants come and amend their second plea in this cause; and, for amendment, say that, on the 30 April, 1861, and while defendant was a loyal citizen of the United States, and faithfully discharging his duty as surveyor of the

port of Nashville and depositary, and safely keeping the funds and effects in his hands as such officer, and which taking such care of the said funds and effects as required by his official bond and by law, the

Confederate States were at war with the United States, and the
20 State of Tennessee was in rebellion against the Government of the United States, and Isham G. Harris, then the lawful and acting governor of Tennessee, having been duly elected and qualified as such in 1859, and was commander of the forces and army of Tennessee, and had large armed forces in the State of Tennessee, and in the city of Nashville, subject to his orders and under his control, and ready to execute his orders, was in sympathy with the said Confederate States, and aiding them in aiding & carrying on war against the United States, seized, or caused his agent S. R. Cockrill, to seize the funds and effects in his the said Thomas' hands, as such officer aforesaid, and took them from his office in the city of Nashville, Tennessee, and from his control, by force & overwhelming power, that he could not resist, against his consent, and refused to surrender them, and carried them off, and he was utterly unable to regain them by due and proper diligence.

That the said Harris & Cockrill, or the latter, acting under the
21 orders of the former, demanded said funds and effects aforesaid; and the said Thomas refused, in good faith, to surrender them; and the said Cockrill, acting under the orders of the said Harris as aforesaid, when an armed force was in Nashville, under his control and ready to execute his orders, threatened to have the said Thomas imprisoned unless he would surrender the said property and effects, and threatened to have the said armed force go into the office of the said Thomas and seize and carry off said funds and effects, and to seize and carry him to prison as aforesaid, unless they were surrendered. That the said Thomas believed that the threats aforesaid would be executed, and that the said Harris and those acting with and under his orders, put the said Thomas under duress, and while under duress forced him to surrender up to them the property and effects aforesaid, against his will and without his consent, and he has not been able to recover them after due and proper diligence; and that the said Thomas was thus

forced to surrender up said property and effects, when he was a
22 loyal citizen of the United States, and in the proper and faithful discharge of his duties as such depositary and officer aforesaid.

That the said Thomas was, when *he*, in the discharge of his duty as aforesaid, as such officer aforesaid, and a loyal citizen as aforesaid, deprived of the said property and effects aforesaid in his hands as aforesaid, and the property and effects in the declaration mentioned, without his consent and against his will, by the public enemy of the United States, in the time of war, and when they had permanent possession of the country.

That it was impossible for the said Thomas to have carried the said funds and property aforesaid, at the time aforesaid, when they were seized as aforesaid, or for some time before that, into the loyal States, or to have so concealed, or deposited, or controlled them so as to have prevented them being seized and captured by the public enemy and taken from him.

That the said Thomas was, against his will and consent, forced by the public enemy to surrender up said property and effects aforesaid,

and he thus been rendered unable to pay over to the United States
23 the funds in the declaration mentioned. & this they are ready to verify.

And the defendants, for further plea, say that the funds & effects

seized & taken from him as aforesaid, were carried South, & from the State of Tennessee by the confederate authorities, and were returned to the Sate of Tennessee after the close of the war, and turned over to the State authorities of the State of Tennessee, and a portion, or all of them delivered to the proper authorities of the United States. And this they are ready to verify.

DEMOSS & MALONE, *Attorneys.*

On the 11th day of May, 1870, a replication to the pleas of defendants was filed, which is as follows:

Replication to amended pleas.

Plaintiffs, for replication to all the pleas of defendants, say that no one of said pleas is true, nor any portion of any one, in manner and form as pleaded by defendants. And this they pray may be inquired of by the country.

R. McP. SMITH,
U. S. Dist. Att'y.

24 And the defendants do the like.

DEMOSS & MALONE, *Att'ys.*

And the 29th day of October, 1870, an entry was made, which is as follows:

Jury empanneled.

THE UNITED STATES
v.
JESSE THOMAS, WASHINGTON B. COOPER, & Samuel Watkins.

Came the parties, by their attorneys, & came also a jury of good & lawful men, to wit: A. J. Davidson, J. W. Lawless, Jeremiah Gilmore, W'm Dodd, P. J. O'Rourke, W. D. Murfree, Jonathan Smith, C. S. Reynolds, M. Herstein, P. W. Maxey, W'm T. Wright, & L. D. Hogle, who, being duly elected, tried, & sworn well & truly to try the issue joined, were respited until Monday morning next at 10 o'clock.

On the 31st day of October, 1870, an entry was made, which is as follows:

Jury respited.

THE UNITED STATES
v.
JESSE THOMAS, WASHINGTON B. COOPER, & Samuel Watkins.

Came again the parties, by their attorneys, & came also the same jury heretofore empanneled in this cause, who, after hearing the evidence & the argument of counsel, were respited until to-morrow morning at 10 o'clock.

25 On the 1st day of November, 1870, an entry was , which is as follows:

Verdict & judgment.

THE UNITED STATES
v.
JESSE THOMAS, WASHINGTON B. COOPER, & Sam'l Watkins.

Came again the parties, by their attorneys, & came again also the same jury heretofore empanneled in this cause, who, after hearing the charge of the court, upon their oaths do say that they find the issues in favor of the defendants.

It is therefore considered by the court that the defendants go hence without day, & that the United States pay the fees properly chargeable thereto, & that the same be certified to the proper officer of the Treasury for payment.

On the 9th day of November, 1870, an entry was made, which is as follows:

Tender of bill of exceptions.

THE UNITED STATES
v.
JESSE THOMAS, W. B. COOPER, & SAMUEL Watkins.

In this cause, the United States district attorney tendered his bill of exceptions to the charge of court, which was signed, & sealed, & ordered to be made a part of the record in said cause.

26 On the 9th day of November, 1870, the following bill of exceptions was filed in said cause:

Bill of exceptions.

THE UNITED STATES
v.
JESSE THOMAS, FORMER SURVEYOR, &C., & Washington B. Cooper, & Samuel Watkins.

At the trial of the above-entitled cause, & before the jury had retired from the bar, the official bond of said Thomas was offered in evidence in behalf of plaintiffs, being in the following words & figures:

Know all men by these presents that we, Jesse Thomas, Washington B. Cooper, & Samuel Watkins, are held & firmly bound unto the United States of America in the full & just sum of twenty thousand dollars, lawful money, to be paid to the said United States; for which payment, well & truly to be made, we jointly & severally bind our , our heirs, executors, & administrators, and each of them, firmly by these presents, signed with our hands, & sealed with our seals, this 19th day of March, in the year of our Lord one thousand eight hundred & fifty-nine.

The condition of the foregoing obligation is such, that whereas the President of the United States hath, pursuant to law, appointed
27 the said Jesse Thomas, by & with the consent of the Senate, to

be surveyor of the customs for the port of Nashville, in the State of Tennessee, and in due form of law caused to be issued to him as such, a commission, bearing date the eighteenth day of February, anno Domini one thousand eight hundred and fifty-nine; and the Secretary of the Treasury having designated the said surveyor of the port of Nashville to be a depositary to receive payment of money due the United States:

Now, therefore, if the said Jessee Thomas has truly and faithfully executed and discharged, and shall truly and faithfully continue to execute and discharge all the duties of said office, according to the laws of the United States, and moreover has well, truly, and faithfully kept, and shall well, truly and faithfully keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by the act of Congress hereinafter specially referred to and described, all the public money collected by him, or otherwise at any time placed in his possession and custody till the same has been, or shall be, ordered by the proper officer or Department of the Government to be transferred or paid out, and when such orders for transfer or payment have
28 been or shall be received, has faithfully and promp'ly made, and shall faithfully and prom'ly make the same as directed, and has done, and shall do, and perform all other duties as fiscal agent of the Government, which have been, or may be, imposed by any act of Congress, or by any regulation of the Treasury Department made in conformity to law, and also has done and performed, and shall do and perform all acts and duties required by law, or by direction of any of the Executive Departments of the Government as agent for paying pensions, or for making any other disbursements which either of the heads of those Departments may be required by law to make, and which are of a character to be made by a depositary constituted by an act of Congress entitled "An act to provide for the better organization of the Treasury, and for the collection, safe-keeping, transfer, and disbursement of the public revenue," approved August 6th, 1846, consistently with the other official duties imposed upon him, then this obligation to be void and of none effect; otherwise it shall abide and remain in full force and virtue.

JESSEE THOMAS. [SEAL.]
WASHINGTON B. COOPER. [SEAL.]
SAMUEL WATKINS. [SEAL.]

29 Signed, sealed, & delivered in presence of—
JOSEPH ANDERON.
J. B. KNOWLES.

NASHVILLE, *March* 19, 1859.

I, West H. Humphreys, United States district judge for the several districts of Tennessee, do certify that I administered the oaths required by law to securities, signing the above bond, and found them qualified and competent as securities in accordance with law.

W. H. HUMPHREYS,
U. S. D. Judge for the several Districts of Tennessee.

UNITED STATES OF AMERICA,
Middle District of Tennessee, ss:

I, W. H. Humphreys, judge of said district, hereby certify that the sureties within named, and who have signed the foregoing bond, are

responsible and sufficient to insure the payment of the entire penalty named therein.

Witness my hand and seal this 19th day of March, 1859.

W. H. HUMPHREYS, [SEAL.]
U. S. Dist. Judge of the Middle District of Tennessee.

OFFICE OF THE SOLICITOR OF THE TREASURY,
April 4, 1859.

30 I hereby certify that the sum named in and the sureties to this bond seem reasonable and safe to me, and are to my satisfaction.

JUNIUS HILLYER,
Solicitor of the Treasury.

UNITED STATES OF AMERICA,
Treasury Department, 17th August, 1869.

Pursuant to the act of Congress of 22d February, 1849, I hereby certify that the annexed is a true copy of the original bond of Jessee Thomas, late designated depositary for the district of Nashville, in the State of Tennessee, now on file in this Department.

In witness whereof I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed on the day and year first above-written.

[SEAL OF TREASURY DEP'T.] W. A. RICHARDSON,
Acting Secretary of the Treasury.

A certified transcript of the account against said Thomas was also in evidence being as follows:

31 *The Treasurer of the United States in a/c current with Jessee Thomas, collector of the customs and designated depositary of the public moneys for the district of Nashville, Tennessee, 27 April*, 1861.

DR.		CR.	
1861.		1861.	
April 22. To cash paid Treasury warrant No. 2648 on No. 6088, in favor of W. H. Harrison and John Willson, local inspectors, dated 17 April, 1861.....	$218 10	April 20. By balance due Treasurer of United States for the week ending April 20, 1861.....	$5,098 98
27. To balance due Treasury United States for the week ending April 27, 1861.....	$4,880 88		
	$5,098 98		$5,098 98

" " By balance due Treasury of the United States for the week ending April 27, 1861..... $4,880 88

JESSEE THOMAS, *Depositary.*

No. 156,721.] TREASURY DEPARTMENT,
FIRST AUDITOR'S OFFICE, *July* 7, 1866.

I hereby certify that I have examined and adjusted an account between the United States and Jessee Thomas, late designated depositary, at Nashville, Tenn., and find that he is chargeable, viz:

To balance due from him per his return to the Treasurer of the U. S., dated 27 April, 1861, and for which the Treasurer of the U. S. will receive credit..... $4,880 88

Dollars 4,880 88

And that the balance due to the United States on the 28 April, 1861, amounted in coin to..... $4,880 88

Dollars 4,880 88

As appears from the statement and vouchers herewith transmitted for the decision of the Comptroller of the Treasury thereon.
$4,880 88.] T. L. SMITH, *First Auditor.*

To the FIRST COMPTROLLER OF THE TREASURY.

COMPTROLLER'S OFFICE.

I admit and certify the above balance this 9th day of July, 1866.
R. W. TAYLER, *Comptroller.*

To the REGISTER OF THE TREASURY.

TREASURY DEPARTMENT,
REGISTER'S OFFICE, *August* 9, 1869.

Pursuant to the act of March 3, 1797, entitled "An act to provide more effectually for the settlement of accounts between the United States and receivers of public moneys," I, John Allison, Register of the Treasury Department, do hereby certify that the annexed copy
33 of the report of the First Auditor of the Treasury numbered No. 156,721, as admitted and certified by the Comptroller upon the account of Jessee Thomas, late designated depositary, at Nashville, Tennessee, is a transcript from the books, and proceedings of the Treasury, and that the copy of the account current of said designated depositary is a true copy of the original on file in this office.
JOHN ALLISON, *Register.*

Be it remembered that John Allison, esq., who certified the annexed transcript, is now, and was at the time of doing so, Register of the Treasury of the United States, and that full faith and credit are due to his official attestations.

In testimony whereof I, William A. Richardson, Acting Secretary of the Treasury of the said United States, have hereunto subscribed my name and caused to be affixed the seal of this Department, at the city of Washington, this ninth day of August, in the year of our Lord 1869.

{ SEAL OF THE TREASURY DEP'T. } WILLIAM A. RICHARDSON,
Acting Secretary of the Treasury.

Said Thomas then introduced evidence that said balance
34 against him was the amount of a deficit of assets in his hands on April 29, 1861, which were then surrendered by him to Isham G. Harris, governor of Tennessee, under circumstances hereinafter set forth, then placed in the Bank of Tennessee and taken South, and afterwards turned over to the U. S. military authorities at Augusta, Georgia, after Gen. Jo. E. Johnson's surrender; that part of said effects were 66 bonds of the State of Tennessee, each calling for $1,000, which were afterwards turned over to the proper Department at Washington.

With regard to said surrender, said Thomas proved as follows

Shortly before April 29, 1861, the steamer Hillman, laden with munitions of war belonging partly to the State and partly to citizens of the State, was seized at Cairo by the national authorities. Thereupon said Harris determined, by way of reprisal, to seize the effects of the United States in the hands of said Thomas, including 66,000 in bonds of the State of Tennessee, which were afterwards turned over to the United States. Accordingly he sent Sterling R. Cockrill to said Thomas
35 with a written demand upon him for said effects, and empowered Cockerill to arrest and imprison him if he refused to comply with the demand. Cockerill called on Thomas on April 29, 1861, and presented said demand. Thomas replied that he was an officer of the United States, and not amenable to State authority, and refused to surrender the effects. These effects were kept on special deposit in an iron box in the City Bank vault, and Thomas had entire control of the box. Thomas was at the time loyal to the United States. Upon his refusal, Cockrill apprised Thomas that he had power to arrest & imprison him if necessary, & stated that he would certainly do so if he persisted in his refusal, & would besides seize the effects all the same, but gave him until the next morning to consider the matter. On the morrow, Cockrill called on Thomas again & renewed his demand for the effects, who reiterated his refusal, urging the same reason. Cockrill then said he would be compelled to imprison him & seize the effects by force. Thomas knew that Harris was a man of great determina-
36 tion, as was also Cockrill, and ample means existed of carrying out the threat of imprisonment and seizure. Nashville was then ablaze with excitement against the Government of the United States. The State, or at least Middle Tennessee, was then as much in rebellion as it ever was.

Military companies were constantly coming in & parading the streets. One of these, the Rock City Guards, which had drawn arms, was at hand, and the captain testified that he would have obeyed any order of the governor's to arrest Thomas & seize the effects in his hands.

Any of the companies would have done the same thing. Besides, it would have been dangerous in the then state of feeling for Thomas to have been known to have made the refusal made by him.

No order of any United States official could have been then executed at Nashville, and the United States were then powerless to help or protect Thomas.

Thomas acted with entire good faith all throughout the whole matter, and finally only surrendered the effects when it was perfectly clear that if he did not they would be seized anyhow and himself impris-
37 oned & exposed to personal violence for longer refusal. He had no opportunity for concealing or removing the effects. No actual application of force, however, was made, nor was any force actually at hand ready to be applied to compel the surrender, though, as stated, overwhelming force was within reach & would have been applied had Thomas not surrendered. Any order of Gov. Harris would have been promptly executed.

The court, among other things not excepted to, charged the jury that if they believed from the evidence that, at the time the demand was made for the surrender by defendant Thomas of the effects in his hands belonging to the Government, there was an organized insurrection in the State of Tennessee and in the city of Nashville against the Government of the United States, with a force sufficient to compel obedience to the orders and demands of the governor of the State, leading & controlling such insurrection, and that in this state of

things the demand was made upon said Thomas to surrender said effects; and if they shall further believe that said Thomas was acting in good faith in refusing to surrender said effects in his hands, & did so only in the honest belief that he would be imprisoned &
38 the effects seized by force, and had good reason to apprehend that and other violence to his person; and the jury shall believe that the threatened force would be applied to compel the surrender of Thomas, then the court was of the opinion that the seizure & appropriation of the Government effects in his hands would be by the public enemies of the United States, and would relieve the said Thomas from liability for the same, notwithstanding the condition of his bond. But the court further charged that if the jury believed that said Thomas was one of the insurrectionists, or willingly co-operated with them in their acts of lawlessness against the Government, then they might infer that he was willing that the effects in controversy shall fall into the hands of Governor Harris and his adherents, & he would not be relieved from the obligations of his bond as surveyor of customs, &c.

To all of which the U. S. district attorney [redacted] excepted, & prayed that this his bill of exceptions might be signed & sealed & made a part of the record; which was accordingly done.

CONNALLY F. TRIGG,
U. S. District Judge, Presiding.

39 *Certificate.*

UNITED STATES OF AMERICA,
Middle District of Tennessee, ss:

I, Edward R. Campbell, clerk of the circuit court of the United States for the district aforesaid, do hereby certify that the foregoing is a true and perfect transcript of the record and of all the proceedings had in our said circuit court in the case of The United States of America against Jessee Thomas, late surveyor of the customs and designated depositary of the port of Nashville, and against Washington B. Cooper and Samuel Watkins, the sureties on his official bond as such surveyor, &c., as the same appears of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of our said court, at Nashville, in the district aforesaid, this the 21st day of November, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the 95th year.

[SEAL.] E. R. CAMPBELL, *Clerk.*

(Indorsement on cover:) No. 189. The United States, plaintiffs in error, vs. Jesse Thomas, Washington B. Cooper, and Samuel Watkins. M. Tennessee C. C. U. S. Filed 13th December, 1870.

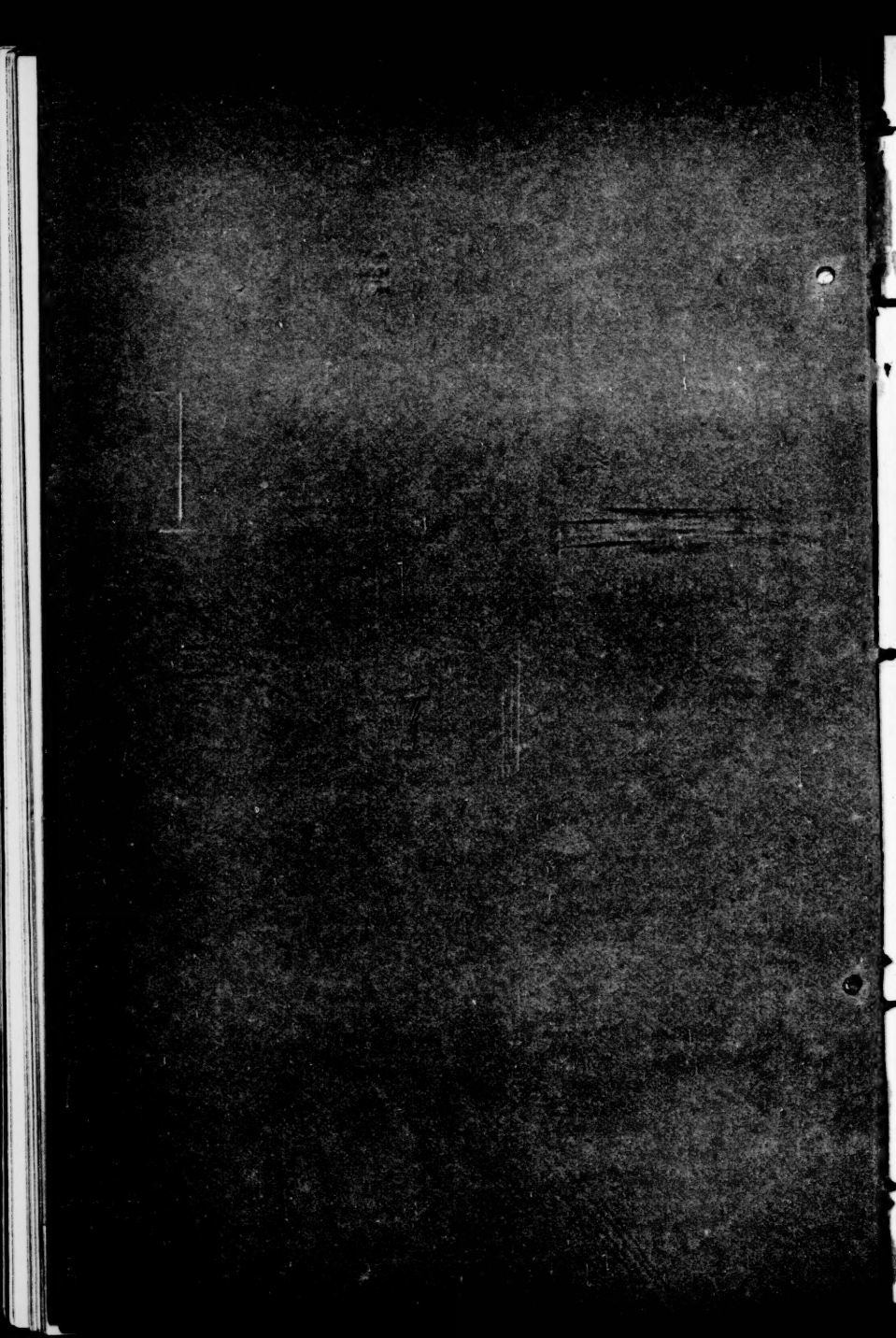
In the Supreme Court of the United States.

DECEMBER TERM, 1871.

THE UNITED STATES, *Plaintiffs in Error*,
vs.
JESSEE THOMAS, WASHINGTON B. COOPER, and SAMUEL WATKINS. } No. 189.

In Error to the Circuit Court of the United States for the middle district of Tennessee.

BRIEF FOR THE UNITED STATES.



In the Supreme Court of the United States.

DECEMBER TERM, 1871.

THE UNITED STATES, *Plaintiffs in Error*,
vs.
JESSEE THOMAS, WASHINGTON B. COOPER, and SAMUEL WATKINS. } No. 189.

In Error to the Circuit Court of the United States for the middle district of Tennessee.

BRIEF FOR THE UNITED STATES.

Suit was brought by the United States in the United States circuit court for the middle district of Tennessee against principal and sureties on the official bond of Jessee Thomas, as a depositary of public moneys at Nashville, Tennessee, to recover a balance of $4,880 88, claimed to be due from him as such depositary.

The bond is dated March 19, 1859, the condition of which, after reciting the appointment of Thomas on the 18th of February, 1859, to be a surveyor of customs for the port of Nashville, Tennessee, and also his designation by the Secretary of the Treasury to be a depositary to receive payment of money due the United States, reads thus:

"Now, therefore, if the said Jessee Thomas has truly and faithfully executed and discharged, and shall truly and faithfully continue to execute and discharge, all

the duties of said office, according to the laws of the United States, and, moreover, has well, truly, and faithfully kept, and shall well, truly, and faithfully keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by the act of Congress hereinafter specially referred to and described, all the public money collected by him, or otherwise at any time placed in his possession and custody, till the same has been, or shall be, ordered by the proper officer or department of the Government to be transferred or paid out, and when such orders for transfer or payment have been or shall be received, has faithfully and promptly made, and shall faithfully and promptly make the same as directed, and has done, or shall do, and perform all other duties as fiscal agent of the Government, which have been, or may be, imposed by any act of Congress, or by any regulation of the Treasury Department made in conformity to law, and also has done and performed, and shall do and perform, all acts and duties required by law, or by direction of any of the Executive Departments of the Government as agent for paying pensions, or for making any other disbursements which either of the heads of those departments may be required by law to make, and which are of a character to be made by a depositary constituted by an act of Congress entitled 'An act to provide for the better organization of the Treasury, and for the collection, safe-keeping, transfer, and disbursement of the public revenue,' approved August 6, 1846, consistently with the other official duties imposed upon him, then this obligation to be void and of none effect; otherwise it shall abide and remain in full force and virtue."

The declaration alleged, first, that certain public moneys were collected by said Thomas in his official capacity, and were placed in his possession and custody in that capacity, and that, on the 27th of April, 1861, there was a balance of such moneys remaining in his hands amounting to $4,880 88; and assigned as a breach that he did not well, truly, and faithfully keep

safely, as he was bound to do, but, on the contrary, paid out the same to persons not entitled to receive the same, &c.; second, that said sum so coming into his possession and custody, and remaining in his hands, was ordered by the proper department and by the proper officer of the Government to be transferred and paid out, and said order was duly received by said Thomas; and assigned as a breach that Thomas wholly failed and refused so to transfer or pay out said sum as so required.

Besides a general plea of performance, the defendants put in a number of special pleas and amended pleas, the latter setting up as a defence that the funds were forcibly seized and taken from him, against his consent and without his fault, on the 30th of April, 1861, by directions of the governor of Tennessee, who was then in sympathy with the so-called Confederate States, and aiding them in carrying on war against the United States.

Issue was joined, and the parties went to trial, which resulted in a verdict for defendants.

A bill of exceptions was taken, from which it appears that at the trial Thomas introduced evidence proving that shortly before April 29, 1861, the steamer Hillman, laden with munitions of war, belonging partly to the State of Tennessee and partly to citizens of that State, was seized at Cairo by the national authorities; that, thereupon, Isham G. Harris, governor of the State, determined to seize the effects of the United States in the hands of Thomas, by way of reprisal, and sent Sterling R. Cockrill to Thomas, with a writ-

ten demand upon him for said effects, and empowered Cockrill to arrest and imprison him if he refused to comply therewith; that Cockrill called on Thomas April 29, 1861, and presented said demand, and that Thomas refused to surrender the effects; that Cockrill then apprised Thomas that he had power to arrest and imprison him if necessary, and stated that he would certainly do so if he, Thomas, persisted in his refusal, and would, besides, seize the effects, but gave him until the next morning to consider; that on the morrow Cockrill called on Thomas again and renewed his demand, but Thomas still refused; that Cockrill then threatened imprisonment, and also seizure of the effects by force; that Thomas acted with entire good faith throughout, and, finally, only surrendered the effects when it was perfectly clear that if he did not they would be seized anyhow, and himself imprisoned and exposed to personal violence for longer refusal. However, no actual application of force was made, nor was any force actually at hand ready to be applied to compel the surrender, though overwhelming force was within reach, and would have been applied had Thomas not surrendered, and any order of Governor Harris would have been promptly executed. The evidence, also, went to show that Nashville was then ablaze with excitement against the Government of the United States, and that the State, or at least Middle Tennessee, was then as much in rebellion as it ever was; that military companies were constantly coming in and parading the streets, any one of which would have enforced any order of the governor's to arrest Thomas and seize the effects in his hands, &c.

The court instructed the jury, in substance, thus: If the demand of the governor upon Thomas for the public moneys held by him as depositary was made when an organized insurrection against the Government of the United States existed in the State, led and controlled by the governor, to whose orders there was sufficient force at hand to compel obedience, and if Thomas, being then entirely loyal to the Government of the United States, surrendered such moneys in the honest belief that, should he refuse to do so, they would be forcibly seized, and he himself be imprisoned, &c., and there was good reason to believe that force would have been applied by the governor, if needed, to compel a surrender of or to secure the moneys—this constituted a good excuse for the non-performance by Thomas of the condition of his bond, and relieved him from liability. (Printed Record, pp. 13, 14.)

We submit that the facts here stated are no defence, and that the court erred in the instructions given.

The point we make is, that performance of an express contract is not excused by reason of anything occurring after the contract was made, though unforeseen by the contracting party, and though beyond his control.

Boyden *vs.* United States, 13 Wallace, 22.
3 Kent's Com., (6th ed.,) 465, et seq.
Metcalf on Con., 213, and cases cited.
Dermott *vs.* Jones, 2 Wallace, 1.
The Harriman, 9 Wallace, 161, 172.
Paradine *vs.* Jane, Aleyn, 26.

"We think it firmly established, both by decided

cases and on principle, that where a party has either expressly or impliedly undertaken, without any qualification, to do anything, and does not do it, he must make compensation in damages, though the performance was rendered impracticable by some unforeseen cause over which he had no control." *Per* Blackburn, J., in Field *vs.* Colesworth, 4 Law Reports, Q. B.,) 134.

The rule has been applied by this and other courts to the cases of official bonds under circumstances undistinguishable in principle from the present.

United States *vs.* Prescott, 3 How., 578.
United States *vs.* Dashiell, 4 Wallace, 185.
United States *vs.* Keehler, 9 Wallace, 83–88.
Boyden *vs.* United States, 13 Wallace, 17.
Commonwealth *vs.* Comley, 3 Barr, 372.
State *vs.* Harper, 6 Ohio St., 607.

In Boyden *vs.* United States, the court observe: "It is true that in Prescott's case the defence set up was that the money had been stolen, while the defence set up here is robbery. But that can make no difference, unless it be held that the receiver is a mere bailee. If, as we have seen, his liability is to be measured by his bond, and that binds him to pay the money, *then the cause which renders it impossible for him to pay* IS OF NO IMPORTANCE, for he has assumed the risk of it."

GEORGE H. WILLIAMS,
Attorney General.

C. H. HILL,
Assistant Attorney General.

IN SUPREME COURT OF THE UNITED STATES.

UNITED STATES

vs.

JESSE THOMAS AND OTHERS.

BRIEF

OF

DEMOSS & MALONE.

IN THE SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1872.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
JESSE THOMAS, WASHINGTON B. COOPER, AND SAMUEL WATKINS, DEFENDANTS IN ERROR.

In error to the Circuit Court of the United States for the Middle District of Tennessee.

Brief for Defendants in error:

The error complained of by plaintiff in error is not raised by the record in this case in such a way as can be noticed or decided by this court.

The trial, verdict, and judgment were on the 1st day of November, 1870, (printed record, pages 8 and 9.)

The bill of exceptions was presented and signed on the 9th day of November, 1870, (printed record, page 9.)

No exception was taken during the progress of the trial, so far as the record discloses.

It is not sufficient that the bill of exceptions shows that objection was made, but it must also appear that exception was taken and reserved during the progress of the trial and at the time the rulings were made.

Walton *vs.* United States, 9 Wheat., 658.
Zellers' Lessee *vs.* Eckhert, 4 Howard, 298.
Sheppard *vs.* Wilson, 6 Howard, 260.
Hutchins *vs.* King, 1 Wallace, 60.
French *vs.* Edwards, 13 Wallace, 506.

This is not a technical rule, but one intended to subserve substantial justice. For when the judge is informed in time that one of the parties excepts to his opinion he has an opportunity of reconsidering or explaining it to the jury. When, therefore, it appeared by the certificate of the judge, made part of the record, that certain instructions asked for were refused at the trial, it was not shown that the exception was filed until a day after the verdict, the exception was held insufficient.

Phelps vs. Mayer, 15 Howard, 160.
Sheppard vs. Wilson, 6 Howard, 260.

When the objection is to the ruling of the court, it is indispensable that the ruling should be stated, and it should also be alleged that the complaining party then and there excepted to the same.

Pomeroy's Lessee vs. Bank of Indiana, 1 Wallace, 602.

The judgment of the court below must be affirmed, unless the bill of exceptions presents some erroneous rulings of the court in the progress of the trial which were then and there excepted to.

Norris vs. Jackson, 9 Wallace, 128.

There is nothing in the bill of exceptions in this case to show that exceptions were taken to the charge of the court during the progress of the trial.

The whole record, taken together, negatives such a conclusion. The evidence is said to have been introduced before the jury had retired to consider of their verdict, but no similar declaration is made as to the exceptions taken. So far as the record shows, the exceptions may have been taken at the time the bill of exceptions was prepared and signed by the presiding judge. This having been after the entry of judgment is too late to avail the plaintiff in error. The judgment should, therefore, be affirmed.

HENRY COOPER,
of Counsel for Defendants.

IN SUPREME COURT OF THE UNITED STATES.

UNITED STATES

versus

JESSE THOMAS AND OTHERS.

THE defendant Thomas was the Surveyor of the Customs for the port of Nashville, in the State of Tennessee, and had been designated, by the Secretary of the Treasury, to be a depository to receive payment of money due the United States.

As such officer, he had the fund in question under his control on the 29th of April, 1861, when Nashville was ablaze with excitement against the Government of the United States, and when the State, or at least Middle Tennessee, was as much in rebellion as it ever was. Military Companies were constantly coming in and parading the streets. One of these, the "Rock City Guards," had drawn arms, and was at hand, and the Captain testified that he would have obeyed any order of the Governor to arrest Thomas and seize the fund. Any of the companies would have done the same thing. Besides, it would have been dangerous, in the then state of feeling, for Thomas to have made a refusal to surrender the fund to the Governor. No order of any United States official could then have been executed at Nashville, and the United States was then powerless to protect Thomas.

Shortly before April 29th, 1861, the steamer *Hillman*, laden with

munitions of war, belonging partly to the State and partly to citizens of the State, was seized at Cairo by the National authorities. Thereupon Governor Harris, the then Governor of Tennessee, determined, by way of reprisal, to seize the effects of the United States in the hands of Thomas. Accordingly, he sent Sterling R. Cockrill to said Thomas, with a written demand upon him for said effects, and empowered Cockrill to arrest and imprison him, if he refused to surrender them.

Cockrill called on Thomas on April 29th, 1861, and presented the demand. Thomas replied that he was an officer of the United States, and not amenable to the State authorities, and refused to surrender the effects. Thomas was, at the time, loyal to the United States. And upon his refusal, Cockrill apprised him that he had power to arrest and imprison him, if necessary, and stated that he would certainly do so, if he persisted in his refusal; and besides, would seize the effects all the same; but would give him until the next morning to consider the matter.

On the morrow Cockrill called on Thomas again, and renewed his demand for the effects, who reiterated his refusal, urging the same reason. Cockrill then said he would be compelled to imprison him and seize the effects by force. Thomas knew that Harris was a man of great determination, as was also Cockrill, and ample means existed of carrying out the threat of seizure and imprisonment. Thomas acted with entire good faith throughout the whole matter, and finally only surrendered the effects when it was perfectly clear that if he did not they would be seized any how, and himself imprisoned, and exposed to personal violence, for longer refusal. He had no opportunity of concealing or removing the effects. No actual application of force, however, was made, nor was any force actually at hand ready to be applied to compel the surrender; though, as stated, an overwhelming force was within reach, and would have been applied, had Thomas not surrendered. Any order of Governor Harris would have been promptly obeyed. The effects so surrendered were, after such surrender, placed in the Bank of Tennessee, and taken South, and afterwards turned over to the United States Military authorities at Augusta, Georgia, after Gen. Jo. E. Johnston's surrender. Part of said effects were sixty-six bonds of the State of Tennessee, calling for one thousand (1000) dollars each, which were afterwards turned over to the proper De-

partment at Washington, and the balance against Thomas was the amount of a deficit of assets in his hands, on the 29th of April, 1861, which were surrendered to Governor Harris under the circumstances above detailed.

The Court, among other things not excepted to, charged the Jury that if they believed, from the evidence, that, at the time the demand was made for the surrender, by Thomas, of the effects in his hands belonging to the Government, there was an organized insurrection in the State of Tennessee, and in the city of Nashville, against the Government of the United States, with a force sufficient to compel obedience to the orders and demands of the Governor of the State, leading and controlling such insurrection, and that in this state of things the demand was made upon Thomas to surrender said effects; and if they should believe that Thomas was acting in good faith, in refusing to surrender said effects in his hands, and did so only in the honest belief that he would be imprisoned, and the effects seized by force, and had good reason to apprehend that, and other violence to his person; and the Jury shall believe that the threatened force would be applied to compel the surrender of Thomas, then the Court was of opinion that the seizure and appropriation of the Government effects in his hands would be by the public enemies of the United States, and would relieve Thomas from liability for the same, notwithstanding the condition of his bond. But the Court further charged that if the Jury believed that Thomas was one of the insurrectionists, or willingly coöperated with them in their acts of lawlessness against the Government, then they might infer that he was willing that the effects in controversy should fall into the hands of Governor Harris and his adherents, he would not be relieved from the obligations of his bond, as Surveyor of the Customs, &c.

Under the above state of facts, and the charge, there was a verdict for the defendants.

And the error complained of is the charge of the Court, that the surrender of the effects of the United States, if coerced by public enemies of the United States, exonerated the officer from compliance with the obligation of his official bond, to keep safely the said effects, and to pay them over as required by the proper officer.

Thomas, with Cooper and Watkins as sureties, executed his bond as such officer aforesaid, on the 19th of March, 1859, conditioned,

among other things, to keep safely all the public moneys collected by him, or otherwise placed in his possession or custody, till the same should be ordered, by the proper officer, to be transferred or paid out. On the 9th of July, 1866, the Comptroller certified that there was a balance due the United States, on the 28th of April, 1861, amounting to $4,480.88. The suit was commenced on the 23rd of August, 1869. The declaration avers that Thomas did not well, truly, and faithfully, keep safely the sum of $4,480.88, the balance in his hands belonging to the United States on April 27th, 1861, as he was bound to do, but, on the contrary, paid out the same to persons not entitled to receive it, and so the same was lost. And the declaration then avers that said sum was ordered, by the proper officer, to be transferred and paid out, which order was received by Thomas, who, nevertheless, failed and refused to transfer and pay out the same, &c. &c.

There is no averment as to when this order was made, but it will not be contended that it was before the seizure.

1st. It was insisted in the Circuit Court, and will, no doubt, be insisted in this Court, that the liability of Thomas arises out of the conditions of his official bond and principles, which are founded upon public policy. And in support of this position the cases of

United States *vs.* Prescott, 3 Howard 587,
United States *vs.* Dashiell, 4 Wallace 182,
United States *vs.* Morgan, 11 Howard 154,
United States *vs.* Kheeler, 9 Wallace 87,

were relied upon. And these cases with perhaps the cases of

United States *vs.* Boyden, 13 Wallace 16,
United States *vs.* Bevens, 13 Wallace 56,

will, no doubt, be relied upon here.

We concede that it is no defense to an action on the official bond of a receiver of public moneys, conditioned to keep safely the public moneys, that the money was feloniously stolen, as in the cases of

United States *vs.* Prescott, 3 Howard 587,
United States *vs.* Dashiell, 4 Wallace 182.

or lost by negligence of the officer, as was really the case of

United States *vs.* Morgan, 11 Howard 154,

or paid over by the officer voluntarily to a creditor of the Govern-

ment, without authority from the United States, but under a statute of the Confederate States, as was the case in the case of the

United States *vs.* Kheeler, 9 Wallace 87,

or where the officer is overpowered and robbed, as in the case of

United States *vs.* Boyden, 13 Wallace 17,

or where an officer is in default and such default concurs with the acts of a public enemy, and contributes to or facilitates the wrong, or renders it possible by which the money is lost, as was the case of

United States *vs.* Bevens, 13 Wallace 56.

The principles settled in these cases have no application to the present case.

And the question left open in the cases of the

United States *vs.* Kheeler, 9 Wallace 87.

United States *vs.* Bevens, 13 Wallace 56.

As to whether the forcible taking of money belonging to the United States, from the possession of one of her officers or agents lawfully holding it, by a government of paramount force, which at the time was usurping the authority of the rightful government, and compelling obedience to itself exclusively throughout a State, would not work a discharge of such officers or agents, if they were entirely free from fault, though they may have given bond to pay the United States, is now presented for the determination of this Court.

In none of the cases above referred to, does it appear that it was impossible to have prevented the loss. And to have excused the officers under the circumstances, might have opened the door to fraud. But in the case at bar, the officer was a loyal citizen; the State of Tennessee was in rebellion, with her Governor, the commander-in-chief of the army and navy of the State, and of the militia, except when they should be called into the service of the United States. [Tennessee Constitution, Article 3, Section 5,] at the head of the insurgents; armed troops were marching through Nashville, ready to obey the Governor's orders; the *Hillman*, with army supplies, had been seized by the Government of the United States; a demand by the Governor was made on Thomas for the effects of the United States, he refused to surrender them; he could not conceal or remove them; his Government was unable to protect either him or the effects; the order of no United States official would have been obeyed, and he is threatened with imprisonment; and finally

after acting in entire good faith, and when it was clear that the fund would be seized anyhow, if not surrendered, and himself imprisoned and exposed to personal violence, Thomas surrendered the effects under duress.

For it was not necessary that actual violence should have been used to constitute duress, moral compulsion was sufficient.

Baker *vs.* Morton, 11 Wallace 156.
Brown *vs.* Pierce, 7 Wallace 214.

2nd. The President of the United States did not proclaim Tennessee or Virginia to be in insurrection against the Government until the 16th of August, 1861. Yet, they had both thrown off their allegience to the Government long before then, and organized forces for the purpose of prosecuting their rights with force. The nature and character of the occupation of Nashville, on the 27th of April, 1861, was sufficient to constitute it enemies' territory. War is a state of things, and not an act of legislative will.

Virginia was held to be engaged in a civil war with the United States, on the 17th of May, 1861, when the Crenshaw was captured at Hampton Roads, although there was no declaration of war.

A civil war is never solemnly declared, it becomes such by its accidents, the number, power, and organization of persons, who originate and carry it on.

When the regular course of justice is interrupted by revolt, rebellion or insurrection, so that the courts of justicë cannot be kept open, civil war exist, and hostilities may be prosecuted, as if those of the opposing government were foreign enemies invading the land.

Prize Cases, 2 Black 666–7–8.

In civil wars each party is entitled to all of the rights of war as against each other.

Wheaton's International Laws, p. 522.

3d. We have now seen that the effects surrendered by Thomas, on the 27th of April, 1861, belonged to the United States, and that civil war existed between Tennessee and the United States at the time.

And if a war existed at the time, then the parties were public enemies.

Miller *vs.* United States, 11 Wallace 309.

Every nation at war with another, is justifiable by the general and strict law of nations, to seize and confiscate the moveable property of the enemy.

Ware *vs.* Hylton, 3 Dallas 226.

Wheaton's International Laws, 526, 596.

This is a belligerent right.

United States *vs.* Miller, 11 Wallace 305.

The commanding General has the right to determine whether or not the emergencies demand the seizure of an enemies property, when subject to seizure.

Mrs. Alexander's Cotton, 2 Wallace 419.

4th. We now have this state of case. Tennessee and the United States are public enemies, the public property of the later is found within the territory of the former, the commanding General has the right to determine, whether or not he will seize it; it is subject to seizure, and he orders Thomas to surrender it—the later finds himself without protection, and is bound to submit to such laws, as the ruler of the territory choses to impose. If he had been ordered by the United States to transfer the effects to the loyal States, he could not possibly have obeyed the order, nor could the United States have enforced it.

Harris was at the head of a government of paramount force. In such a case it is not only a necessity, but a duty of parties who reside in such territory, to yield obedience to the ruling power, in all civil and local matters.

Harrington *vs.* Smith, 8 Wallace 11.

Where there is no protection, no allegiance or sovereignty, there can be no claim to obedience.

United States *vs.* Rice, 4 Wheaton 392.

It is most manifest, that it was impossible for Thomas to have kept the covenants of his bond, and that he is in no fault—will he be held to imposibilities?

Suppose in battle a Paymaster or Quartermaster had been captured, and the funds to pay off the troops or the rations to feed them had been taken from him, would any person suppose, that such cap-

ture and seizure would not relieve him from the covenants of his bond? Certainly not. Why? Because it become impossible for him to perform them. But not more impossible than for Thomas to perform his covenants, and for the same reason, to wit, the inability of his government to protect him; and because the seizure was so notorious, that it would be impossible to deceive the Government about it, and because no door to fraud would be opened.

5th. A vender is not liable on his warranty for acts of the public enemy.

Curtis *vs.* Innerarity, 6 Howard 156.

And why? Because impossible to keep it. Then, why should the vendor's warranty be of less dignity than the covenant of a public officer? when it was impossible to keep either.

DEMOSS & MALONE,
Of Counsel for Defendants.

Henry C. Cooper
Of Counsel for Defts

2. Wallace 460

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Wm Strong

Wm Strong

IN SUPREME COURT OF THE UNITED STATES.

UNITED STATES

vs.

JESSE THOMAS AND OTHERS.

BRIEF

OF

DEMOSS & MALONE,

AND

HENRY COOPER.

Short

thereon

Affirm

IN THE SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1872.

THE UNITED STATES, PLAINTIFF IN ERROR, *vs.* JESSE THOMAS, WASHINGTON B. COOPER, AND SAMUEL WATKINS, DEFENDANTS IN ERROR.	In error to the Circuit Court of the United States for the Middle District of Tennessee.

Brief for Defendants in error:

The error complained of by plaintiff in error is not raised by the record in this case in such a way as can be noticed or decided by this court.

The trial, verdict, and judgment were on the 1st day of November, 1870, (printed record, pages 8 and 9.)

The bill of exceptions was presented and signed on the 9th day of November, 1870, (printed record, page 9.)

No exception was taken during the progress of the trial, so far as the record discloses.

It is not sufficient that the bill of exceptions shows that objection was made, but it must also appear that exception was taken and reserved during the progress of the trial and at the time the rulings were made.

Walton *vs.* United States, 9 Wheat., 658.
Zellers' Lessee *vs.* Eckhert, 4 Howard, 298.
Sheppard *vs.* Wilson, 6 Howard, 260,
Hutchins *vs.* King, 1 Wallace, 60.
French *vs.* Edwards, 13 Wallace, 506.

This is not a technical rule, but one intended to subserve substantial justice. For when the judge is informed in time that one of the parties excepts to his opinion he has an opportunity of reconsidering or explaining it to the jury. When, therefore, it appeared by the certificate of the judge, made part of the record, that certain instructions asked for were refused at the trial, it was not shown that the exception was filed until a day after the verdict, the exception was held insufficient.

Phelps *vs.* Mayer, 15 Howard, 160.
Sheppard *vs.* Wilson, 6 Howard, 260.

When the objection is to the ruling of the court, it is indispensable that the ruling should be stated, and it should also be alleged that the complaining party then and there excepted to the same.

Pomeroy's Lessee *vs.* Bank of Indiana, 1 Wallace, 602.

The judgment of the court below must be affirmed, unless the bill of exceptions presents some erroneous rulings of the court in the progress of the trial which were then and there excepted to.

Norris *vs.* Jackson, 9 Wallace, 128.

There is nothing in the bill of exceptions in this case to show that exceptions were taken to the charge of the court during the progress of the trial.

The whole record, taken together, negatives such a conclusion. The evidence is said to have been introduced before the jury had retired to consider of their verdict, but no similar declaration is made as to the exceptions taken. So far as the record shows, the exceptions may have been taken at the time the bill of exceptions was prepared and signed by the presiding judge. This having been after the entry of judgment is too late to avail the plaintiff in error. The judgment should, therefore, be affirmed.

The defendant Thomas was the Surveyor of the Customs for the port of Nashville, in the State of Tennessee, and had been designated by the Secretary of the Treasury to be a depository to receive payment of money due the United States.

As such officer he had the fund in question under his control on the 29th of April, 1861, when Nashville was ablaze with excitement against the Government of the United States, and when the State, or at least Middle Tennessee, was as much in rebellion as it ever was. Military companies were constantly coming in and parading the streets. One of these, the "Rock City Guards," had drawn arms and was at hand, and the captain testified that he would have obeyed any order of the Governor to arrest Thomas and seize the fund. Any of the companies would have done the same thing. Besides, it would have been dangerous in the then state of feeling for Thomas to have made a refusal to surrender the fund to the Governor. No order of any United States official could then have been executed at Nashville, and the United States was then powerless to protect Thomas.

Shortly before April 29, 1861, the steamer Hillman, laden with munitions of war, belonging partly to the State and partly to citizens of the State, was seized at Cairo by the national authorities. Thereupon, Governor Harris, the then Governor of Tennessee, determined by way of reprisal to seize the effects of the United States in the hands of Thomas. Accordingly, he sent Sterling R. Cockrill to said Thomas with a written demand upon him for said effects, and empowered Cockrill to arrest and imprison him if he refused to surrender them.

Cockrill called on Thomas on April 29, 1861, and presented the demand. Thomas replied that he was an officer of the United States, and not amenable to the State authorities, and refused to surrender the effects. Thomas was, at the time, loyal to the United States. And upon his refusal Cockrill apprised him that he had power to arrest and imprison him, if necessary, and stated that he would certainly do so if he persisted in his refusal; and besides, would seize the effects all the same; but would give him until the next morning to consider the matter.

On the morrow Cockrill called on Thomas again, and renewed his demand for the effects, who reiterated his refusal, urging the same reason. Cockrill then said he would be compelled to imprison him and seize the effects by force. Thomas knew that Harris was a man of great determination, as was also Cockrill, and ample means

existed of carrying out the threat of seizure and imprisonment. Thomas acted with entire good faith throughout the whole matter, and finally only surrendered the effects when it was perfectly clear that if he did not they would be seized any how, and himself imprisoned, and exposed to personal violence for longer refusal. He had no opportunity of concealing or removing the effects. No actual application of force, however, was made, nor was any force actually at hand ready to be applied to compel the surrender; though, as stated, an overwhelming force was within reach, and would have been applied had Thomas not surrendered. Any order of Governor Harris would have been promptly obeyed. The effects so surrendered were, after such surrender, placed in the Bank of Tennessee, and taken South, and afterward turned over to the United States military authorities at Augusta, Georgia, after Gen. Jo. E. Johnston's surrender. Part of said effects were sixty-six bonds of the State of Tennessee, calling for one thousand (1,000) dollars each, which were afterward turned over to the proper Department at Washington, and the balance against Thomas was the amount of a deficit of assets in his hands, on the 29th of April, 1861, which were surrendered to Governor Harris under the circumstances above detailed.

The court, among other things not excepted to, charged the jury that if they believed from the evidence that at the time the demand was made for the surrender by Thomas of the effects in his hands belonging to the Government there was an organized insurrection in the State of Tennessee, and in the city of Nashville, against the Government of the United States, with a force sufficient to compel obedience to the orders and demands of the Governor of the State, leading and controlling such insurrection, and that in this state of things the demand was made upon Thomas to surrender said effects; and if they should believe that Thomas was acting in good faith in refusing to surrender said effects in his hands, and did so only in the honest belief that he would be imprisoned and the effects seized by force, and had good reason to apprehend that, and other violence to his person; and the jury shall believe that the threatened force would be applied to compel the surrender of Thomas, then the court was of opinion that the seizure and appropriation of the Government effects in his hands would be by the public enemies of the United States, and would relieve Thomas from liability for the same, notwithstanding the condition of his bond. But the court further charged that if the jury believed that Thomas was one of the insurrectionists, or willingly coöperated with them in their acts of lawlessness against the Government, then they might infer that he was willing that the effects in controversy should fall into the hands of Governor Harris and his adherents, he would not be relieved from the obligations of his bond as surveyor of the customs, &c.

Under the above state of facts, and the charge, there was a verdict for the defendants.

And the error complained of is the charge of the court, that the surrender of the effects of the United States, if coerced by public enemies of the United States, exonerated the officer from compliance with the obligation of his official bond to keep safely the said effects and to pay them over as required by the proper officer.

Thomas, with Cooper and Watkins as sureties, executed his bond as such officer aforesaid, on the 19th of March, 1859, conditioned, among other things, to keep safely all the public moneys collected by him, or ortherwise placed in his possession or custody, till the same should be ordered, by the proper officer, to be transferred or paid out. On the 9th of July, 1866, the Comptroller certified that there was a balance due the United States, on the 28th of April, 1861, amounting to $4,480 88. The suit was commenced on the 23d of August, 1869. The declaration avers that Thomas did not well, truly,

and faithfully, keep safely the sum of $4,480 88, the balance in his hands belonging to the United States on April 27, 1861, as he was bound to do, but, on the contrary, paid out the same to persons not entitled to receive it, and so the same was lost. And the declaration then avers that said sum was ordered, by the proper officer, to be transferred and paid out, which order was received by Thomas, who, nevertheless, failed and refused to transfer and pay out the same, &c., &c.

There is no averment as to when this order was made, but it will not be contended that it was before the seizure.

1st. It was insisted in the Circuit Court, and will, no doubt, be insisted in this court, that the liability of Thomas arises out of the conditions of his official bond and principles which are founded upon public policy. And in support of this position the cases of

United States *vs.* Prescott, 3 Howard, 587,
United States *vs.* Dashiell, 4 Wallace, 182,
United States *vs.* Morgan, 11 Howard, 154,
United States *vs.* Kheeler, 9 Wallace, 87,

were relied upon. And these cases, with perhaps the cases of

United States *vs.* Boyden, 13 Wallace, 16,
United States *vs.* Bevens, 13 Wallace, 56,

will, no doubt, be relied upon here.

We concede that it is no defense to an action on the official bond of a receiver of public moneys, conditioned to keep safely the public moneys, that the money was feloniously stolen, as in the cases of

United States *vs.* Prescott, 3 Howard, 587,
United States *vs.* Dashiell, 4 Wallace, 182,

or lost by negligence of the officer, as was really the case of

United States *vs.* Morgan, 11 Howard, 154,

or paid over by the officer voluntarily to a creditor of the Government, without authority from the United States, but under a statute of the Confederate States, as was the case in the case of the

United States *vs.* Kheeler, 9 Wallace, 87,

or where the officer is overpowered and robbed, as in the case of

United States *vs.* Boyden, 13 Wallace, 17,

or where an officer is in default and such default concurs with the acts of a public enemy, and contributes to or facilitates the wrong, or renders it possible, by which the money is lost, as was the case of

United States *vs.* Bevens, 13 Wallace 56.

The principles settled in these cases have no application to the present case.

And the question left open in the cases of the

United States *vs.* Kheeler, 9 Wallace, 87,
United States *vs.* Bevens, 13 Wallace, 56,

as to whether the forcible taking of money belonging to the United States, from the possession of one of her officers or agents lawfully holding it, by a government of paramount force, which at the time was usurping the authority of the rightful government, and compelling obedience to itself exclusively throughout a State, would not work a discharge of such officers or agents, if they were entirely free from fault, though they may have given bond to pay the United States, is now presented for the determination of this Court.

In none of the cases above referred to does it appear that it was impossible to have prevented the loss. And to have excused the officers, under the circumstances, might have opened the door to fraud. But in the case at bar the officer was a loyal citizen; the State of Tennessee was in rebellion, with her Governor, the commander-in-chief of the army and navy of the State, and of the militia, except when they should be called into the service of the United States. [Tennessee Constitution, Article 3, Section 5,] at the head of the insurgents; armed troops were marching through Nashville, ready to obey the Governor's orders; the *Hillman*, with army supplies, had been seized by the Government of the United States; a demand by the Governor was made on Thomas for the effects of the United States. He refused to surrender them; he could not conceal or remove them; his Government was unable to protect either him or the effects; the order of no United States official would have been obeyed, and he is threatened with imprisonment; and finally, after acting in entire good faith, and when it was clear that the fund would be seized anyhow, if not surrendered, and himself imprisoned and exposed to personal violence, Thomas surrendered the effects under duress.

For it was not necessary that actual violence should have been used to constitute duress, moral compulsion was sufficient.

Baker *vs.* Morton, 11 Wallace, 156.
Brown *vs.* Pierce, 7 Wallace, 214.

2d. The President of the United States did not proclaim Tennessee or Virginia to be in insurrection against the Government until the 16th of August, 1861. Yet, they had both thrown off their allegiance to the Government long before then, and organized forces for the purpose of prosecuting their rights with force. The nature and character of the occupation of Nashville, on the 27th of April, 1861, was sufficient to constitute it enemies' territory. War is a state of things, and not an act of legislative will.

Virginia was held to be engaged in a civil war with the United States on the 17th of May, 1861, when the Crenshaw was captured at Hampton Roads, although there was no declaration of war.

A civil war is never solemnly declared; it becomes such by its accidents, the number, power, and organization of persons, who originate and carry it on.

When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists, and hostilities may be prosecuted as if those of the opposing government were foreign enemies invading the land.

Prize Cases, 2 Black, 666-7-8.

In civil wars each party is entitled to all of the rights of war as against each other.

Wheaton's International Law, p. 522.

3d. We have now seen that the effects surrendered by Thomas, on the 27th of April, 1861, belonged to the United States, and that civil war existed between Tennessee and the United States at the time.

And if a war existed at the time, then the parties were public enemies.

Miller *vs.* United States, 11 Wallace, 309.

Every nation at war with another is justifiable, by the general and strict law of nations, to seize and confiscate the movable property of the enemy.

Ware *vs.* Hylton, 3 Dallas, 226.
Wheaton's International Law, 525, 596.

This is a belligerent right.

United States *vs.* Miller, 11 Wallace, 305.

The commanding General has the right to determine whether or not the emergencies demand the seizure of an enemy's property, when subject to seizure.

Mrs. Alexander's Cotton, 2 Wallace, 419.

4th. We now have this state of case: Tennessee and the United States are public enemies; the public property of the latter is found within the territory of the former; the commanding General has the right to determine whether or not he will seize it; it is subject to seizure, and he orders Thomas to surrender it; the latter finds himself without protection and is bound to submit to such laws as the ruler of the territory chooses to impose. If he had been ordered by the United States to transfer the effects to the loyal States he could not possibly have obeyed the order, nor could the United States have enforced it.

Harris was at the head of a government of paramount force. In such a case it is not only a necessity, but the duty of parties who reside in such territory, to yield obedience to the ruling power in all civil and local matters.

Mornington *vs.* Smith, 8 Wallace, 11.

Where there is no protection, no allegiance or sovereignty, there can be no claim to obedience.

United States *vs.* Rice, 4 Wheaton, 392.

It is most manifest that it was impossible for Thomas to have kept the covenants of his bond, and that he is in no fault. Will he be held to impossibilities?

Suppose in battle a Paymaster or Quartermaster had been captured, and the funds to pay off the troops or the rations to feed them had been taken from him, would any person suppose that such capture and seizure would not relieve him from the covenants of his bond? Certainly not. Why? Because it became impossible for him to perform them. But not more impossible than for Thomas to perform his covenants, and for the same reason, to wit, the inability of his Government to protect him; and because the seizure was so notorious that it would be impossible to deceive the Government about it, and because no door to fraud would be opened.

5th. A vendor is not liable on his warranty for acts of the public enemy.

Curtis *vs.* Innerarity, 6 Howard, 156.

And why? Because impossible to keep it. Then, why should the vendor's warranty be of less dignity than the covenant of a public officer, when it was impossible to keep either?

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